

AYER  
PLI 119153

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-204580

DATE: August 9, 1982

MATTER OF: Marine Construction and Dredging, Inc.

## DIGEST:

1. GAO reviews protests to see if contracting agency's actions are supportable and not to see if proper justification was advanced by agency at time of action. Consequently, neither GAO nor contracting agency is restricted to initial justifications in consideration of propriety of protested agency action.
2. Determination of nonresponsibility of small business concern, otherwise in line for award, should have been referred to SBA for consideration under certificate of competency program.

Marine Construction and Dredging, Inc. (Marine), protests United States Army, Corps of Engineers (Army), procedures in awarding dredging contracts to Shellmaker, Inc., under invitations for bids (IFB) No. DACW07-81-B-0035 (Alameda IFB) and No. DACW07-81-B-0028 (Napa River IFB).

Marine protests the Army's rejection of its low bid under the Alameda IFB as nonresponsive. The Army stated that the basis for rejection was Marine's nonresponsibility. Under either approach, the underlying reason for Marine's rejection was a provision of the Alameda IFB which states that prior to award of the contract, the bidder's equipment will be evaluated to establish specific production capability in accordance with Corps of Engineers regulation ER 1110-2-1300. Marine failed the evaluation because the equipment it offered did not conform to a chart contained in the regulation. The Army thereupon awarded the Alameda IFB to Shellmaker.

Marine's protest of the Napa River IFB, containing a similar equipment evaluation provision, is premised

on Marine's allegation that Shellmaker's equipment on the Napa River IFB also fails to meet the regulation's chart requirement. Marine argues that the Army cannot deny it the Alameda award when Shellmaker received the Napa River award notwithstanding its noncompliance. In so arguing, Marine apparently believes that Shellmaker properly received that award as far as application of the regulation is concerned because the Army correctly looked at other equipment data permitted by the regulation rather than requiring strict compliance with the chart. Finally, Marine argues that Shellmaker is nonresponsible to perform either contract because of alleged failure to perform the Napa River contract on schedule.

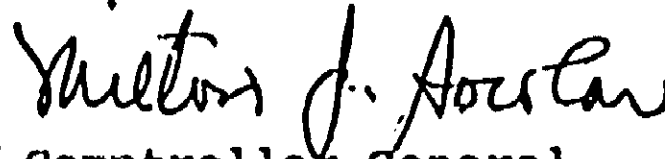
We agree with both parties that the equipment provision is a matter of responsibility rather than responsiveness because the provision is not a contract performance requirement. Marine, however, seeks to hold the Army to its initial nonresponsiveness characterization of the reason for rejecting Marine's bid. We review bid protests to see if a contracting agency's actions are supportable in view of applicable procurement statutes and regulations. We are not limited to consideration of specific justifications which the contracting agency may have advanced at the time it initially acted. Consequently, we are not restricted in our consideration of the propriety of the protested actions to such initial justifications and neither is the contracting agency. Trail Equipment Company, B-205206 January 27, 1982, 82-1 CPD 63; Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329.

We have been advised that Marine is a small business concern. In such circumstances, the nonresponsibility determination should have been referred to the Small Business Administration (SBA) under the certificate of competency procedures, as SBA has conclusive authority to determine all matters of small business responsibility, if the bidder is found nonresponsible. See Com-Data, Inc., B-191289, June 23, 1978, 78-1 CPD 459. For this reason, we sustain the protest on the Alameda IFB. However, we cannot recommend relief, as the Army has advised that performance under the Alameda contract is complete and no useful

purpose would be served by referring the matter to SBA at this time. By letter of today, we are advising the Secretary of the Army that steps should be taken to prevent any future failures to refer small business nonresponsibility determinations to SBA.

As for the Napa River IPB, we have already noted that Marine considers correct the Army's application of the regulation there. Therefore, we need not decide whether the regulation was properly applied. The protest against Shellmaker's nonresponsibility for both projects due to alleged general inability to perform is not for our consideration because it amounts to a protest of affirmative responsibility determinations, which we do not review. See Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

Accordingly, the protest is sustained in part and dismissed in part.

*for*   
Comptroller General  
of the United States